United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 20-1234**
	)	**Issued: January 27, 2022**
U.S. POSTAL SERVICE, ROMEOVILLE POST OFFICE, ROMEOVILLE, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 1, 2020 appellant, through counsel, filed a timely appeal from an April 20, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq*.

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On July 5, 2016 appellant, then a 37-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she developed carpal tunnel syndrome due to factors of her federal employment. She noted that she first became aware of her condition and its relationship to her federal employment on April 27, 2016. Appellant stopped work on June 29, 2016. On September 9, 2015 OWCP accepted her claim for carpal tunnel syndrome of the left upper limb. It paid appellant wage-loss compensation on the supplemental rolls beginning September 17, 2016.

Appellant underwent OWCP-authorized left carpal tunnel release on October 17, 2016.

Appellant returned to full-duty work on March 4, 2017.

On August 28, 2017 appellant filed a claim for compensation (Form CA-7) a schedule award.

In a March 16, 2018 report, Dr. Neil Allen, a Board-certified internist and neurologist, reviewed appellant's medical history and provided findings on physical examination. He noted that she experienced numbness and tingling in her left hand and opined that she had reached maximum medical improvement (MMI). Dr. Allen found that appellant had full muscle strength in her left and right hands. He provided a permanent impairment rating for the left wrist utilizing Table 15-23 (Entrapment/Compression Neuropathy Impairment) on page 449 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] Dr. Allen determined that appellant's condition fell under grade modifier 1 for test findings, grade modifier 3 for history, and grade modifier 2 for physical findings. He reported a *Quick*DASH score of 59 for the functional scale portion of Table 15-23 and concluded that she had a total of five percent permanent impairment of the left upper extremity.

On July 13, 2018 OWCP referred appellant's case, along with a statement of accepted facts (SOAF), for a schedule award impairment rating with Dr. David Slutsky, a Board-certified orthopedic surgeon serving as the district medical adviser (DMA). In a July 29, 2018 report, Dr. Slutsky reviewed the medical record and SOAF. He disagreed with Dr. Allen's March 16, 2018 impairment rating report, noting that appellant's electromyography (EMG) and nerve conduction velocity (NCV) study findings did not meet the criteria for carpal tunnel syndrome impairment under the A.M.A., *Guides*. Accordingly, Dr. Slutsky utilized the diagnosis-based impairment (DBI) method of the A.M.A., *Guides*. He identified the class of diagnosis (CDX) as a class one impairment for the diagnosis of wrist sprain/strain under Table 15-3, page 395. Dr. Slutsky found that a grade modifier for functional history (GMFH) was not applicable, in accordance with Table 15-7, page 406, as appellant had no documented wrist pain. He assigned a

[3] A.M.A., *Guides* (6th ed. 2009).

grade modifier for physical examination (GMPE) of zero, in accordance with Table 15-8, page 408, as she had no palpatory findings. Dr. Slutsky reported a grade modifier for clinical studies (GMCS) of zero in accordance with Table 15-9, page 410, as there were no imaging studies. He calculated that appellant had a net adjustment of -1, resulting in movement from the default value of C to B and corresponding to zero percent upper extremity impairment. Dr. Slutsky noted that a rating under the range of motion (ROM) methodology could not be calculated as validated upper extremity measurements of the wrist were not performed. He opined that appellant reached MMI on March 16, 2018.

On August 8, 2018 appellant was referred for a second opinion examination with Dr. Allan Brecher, a Board-certified orthopedic surgeon. In a September 7, 2018 report, Dr. Brecher reviewed the medical record and SOAF. He examined appellant and noted wrist dorsiflexion of 72 degrees, palmar flexion of 82 degrees, radial deviation of 20 degrees, and ulnar deviation of 31 degrees on the left compared to 74, 82, 24, and 38 degrees respectively on the right. Utilizing the DBI method of the A.M.A., *Guides*, Dr. Brecher identified the CDX as a class one impairment for the diagnosis of nonspecific wrist pain under Table 15-3. He noted that a GMFH was not applicable, in accordance with Table 15-7, page 406, as appellant had no documented wrist pain. Dr. Brecher assigned a GMPE of zero as she had no palpatory findings. He reported a GMCS of zero as there were no imaging studies. Dr. Brecher indicated that appellant's *Quick*DASH score was 66 and found that appellant had a grade B, zero percent upper extremity impairment. He opined that she reached MMI on March 16, 2018. Dr. Brecher noted that a rating under the ROM methodology would also be zero percent. He agreed with Dr. Slutsky's assessment that appellant did not meet the criteria for carpal tunnel syndrome impairment under the A.M.A., *Guides* based on her EMG study. Dr. Brecher opined that Dr. Allen's March 16, 2018 impairment report was not reliable as he did not perform a ROM rating or use two-point discrimination.

OWCP subsequently referred appellant's case, along with a SOAF and the medical record, to Dr. John Kung, a Board-certified orthopedic surgeon, for an impartial medical examination in order to resolve the conflict in medical evidence between Drs. Allen and Brecher regarding her permanent impairment of the left upper extremity. In a March 28, 2019 report, Dr. Kung reviewed the medical record and SOAF. He examined appellant and noted wrist dorsiflexion of 65 degrees, wrist flexion of 60 degrees, ulnar deviation of 35 degrees, and radial deviation of 20 degrees on the left compared to 65, 65, 35, and 25 degrees respectively on the right. Dr. Kung agreed with Drs. Brecher and Slutsky that she did not meet the criteria for carpal tunnel syndrome impairment under the A.M.A., *Guides* based on her EMG/NCV study findings. He therefore disagreed with Dr. Allen's determination of five percent permanent upper extremity impairment. Utilizing the DBI method of the A.M.A., *Guides*, Dr. Kung identified the CDX as a class one impairment for the diagnosis of nonspecific wrist pain under Table 15-3. He found a GMFH of zero as appellant had no functional issues. Dr. Kung assigned a GMPE of zero as she had no abnormal physical findings and normal ROM. He reported a GMCS of zero as there were no clinical studies. Dr. Kung calculated that appellant had a net adjustment of -3, resulting in movement from the default value of C to A and corresponding to a zero percent upper extremity impairment rating. He noted that a ROM impairment rating could not be used as her ROM was normal. Dr. Kung concurred with Dr. Brecher's assessment that appellant had a zero percent upper extremity impairment rating.

By decision dated July 30, 2019, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body. It noted that the special weight of the medical evidence rested with Dr. Kung, serving as the impartial medical examiner.

On August 7, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a letter dated November 4, 2019, appellant through counsel, requested a review of the written record in lieu of an oral hearing.

By decision dated December 12, 2019, OWCP's hearing representative affirmed the July 30, 2019 decision.

OWCP subsequently received a December 10, 2019 addendum from Dr. Allen, who reviewed the impairment rating reports from Drs. Slutsky and Brecher. Dr. Allen noted that, after further review of appellant's EMG findings, she did not qualify for impairment under the entrapment/compression neuropathy method of the A.M.A., *Guides*. Utilizing the DBI method of the A.M.A., *Guides*, he identified the CDX as a class one impairment for the diagnosis of left wrist pain under Table 15-3, page 395. Dr. Allen found that a GMFH was not applicable, in accordance with Table 15-7, page 406, as it varied by two or more from the GMCS. He assigned a GMPE of 2, in accordance with Table 15-8, page 408, as appellant had moderate palpatory findings and mild thenar atrophy. Dr. Allen reported a GMCS of zero in accordance with Table 15-9, page 410, as the EMG/NCV findings did not qualify for a diagnosis of carpal tunnel syndrome. He calculated that appellant had a net adjustment of zero, resulting in no movement from the default value of C and corresponding to a one percent left upper extremity impairment.

On January 8, 2020 appellant, through counsel, requested reconsideration.

On February 28, 2020 OWCP referred appellant's case to Dr. Slutsky, the DMA, for review of the newly submitted medical evidence. In an April 4, 2020 report, Dr. Slutsky reviewed the SOAF and medical record, including Dr. Allen's December 10, 2019 addendum. He noted that Dr. Allen assigned a GMPE of 2 as he found that appellant had tenderness through the distal third of the forearm. However, Dr. Slutsky disagreed with Dr. Allen's determination as he did not palpate her wrist or perform an adequate wrist examination which would document specific sites of palpatory tenderness. He noted that Dr. Allen did not perform a Finkelstein's test, a Watson's test, or a lunotriquetral ballottement test. Dr. Slutsky therefore concluded that Dr. Allen's impairment rating was not supportable under the A.M.A., *Guides*. He indicated that, if physical examination findings were determined to be unreliable or inconsistent, they were to be excluded from the grading process under section 15.3b, page 407. Accordingly, Dr. Slutsky found that appellant had zero percent upper extremity impairment for the diagnosis of left carpal tunnel syndrome which was rated as nonspecific wrist pain.

By decision dated April 20, 2020, OWCP again denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body. It based its determination on the opinion of the DMA.

LEGAL PRECEDENT

The schedule award provisions of FECA,[4] and its implementing federal regulations,[5] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[8] In Table 15-23, grade modifiers levels (ranging from 0 to 4) are described for the categories Test Findings, History, and Physical Findings. The grade modifier levels are averaged to arrive at the appropriate overall grade modifier level and to identify a default rating value. The default rating value may be modified up or down based on functional scale, an assessment of impact on daily living activities.[9]

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF): A Contemporary Model of Disablement.[10] Under the sixth edition, the evaluator identifies the CDX, which is then adjusted by the GMFH, GMPE, and GMCS.[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12] Evaluators are directed to provide reasons for their impairment rating, including the choice of diagnoses from regional grids and the calculation of the modifier score.[13]

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, OWCP

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.* at § 10.404(a).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a. (March 2017); *see also* Chapter 3.700.2 and Exhibit 1 (January 2010).

[8] A.M.A., *Guides* 449.

[9] A survey completed by a given claimant, known by the name *Quick*DASH, may be used to determine the functional scale score. *Id.* at 448-49; *see also J.H.*, Docket No. 19-0395 (issued August 10, 2020).

[10] A.M.A., *Guides* 3, section 1.3(a).

[11] *Id.* at 493-556.

[12] *Id.* at 521.

[13] *E.W.*, Docket No. 19-1720 (issued November 25, 2020); *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[14] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[15] When there exists opposing reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[16]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[17]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

OWCP properly determined that a conflict in the medical opinion evidence existed between Dr. Allen, appellant's attending physician, and Dr. Brecher, OWCP's referral physician, on the issue of whether appellant had permanent impairment of a scheduled member due to her accepted left carpal tunnel syndrome. It properly referred her case to Dr. Kung pursuant to 5 U.S.C. § 8123(a) for an impartial medical examination in order to resolve the conflict in medical opinion.[18]

In a March 28, 2019 report, Dr. Kung noted that appellant did not meet the criteria for carpal tunnel syndrome impairment under the A.M.A., *Guides* based on her EMG/NCV study findings. He disagreed with Dr. Allen's determination of five percent permanent upper extremity impairment. Utilizing the DBI method of the A.M.A., *Guides*, Dr. Kung identified the CDX as a class one impairment for the diagnosis of nonspecific wrist pain under Table 15-3. He found a GMFH of zero as appellant had no functional issues. Dr. Kung assigned a GMPE of zero as appellant had no abnormal physical findings and normal ROM. He reported a GMCS of zero as there were no clinical studies. Dr. Kung calculated that appellant had a net adjustment of -3, resulting in movement from the default value of C to A and corresponding to zero percent upper extremity impairment rating.

Dr. Kung's opinion was based on a proper factual and medical history and on the appropriate tables and grading schemes of the A.M.A., *Guides*. Accordingly, OWCP properly

[14] 5 U.S.C. § 8123(a); *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *M.S.*, 58 ECAB 328 (2007).

[15] 20 C.F.R. § 10.321; *see also R.C.*, 58 ECAB 238 (2006).

[16] *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[17] *See supra* note 7 at Chapter 2.808.6(f) (March 2017).

[18] *See J.B.*, Docket No. 18-0116 (issued October 2, 2020).

accorded the special weight of the medical evidence to Dr. Kung's March 28, 2019 report and denied appellant's schedule award claim.[19]

Appellant subsequently submitted a December 10, 2019 addendum report from Dr. Allen. Utilizing the DBI method of the A.M.A., *Guides*, Dr. Allen identified the CDX as a class one impairment for the diagnosis of left wrist pain under Table 15-3, page 395. He found that a GMFH was not applicable, in accordance with Table 15-7, page 406, as it varied by two or more from the GMCS. Dr. Allen assigned a GMPE of 2, in accordance with Table 15-8, page 408, as appellant had moderate palpatory findings and mild thenar atrophy. He reported a GMCS of zero in accordance with Table 15-9, page 410, as the EMG/NCV findings did not qualify for a diagnosis of carpal tunnel syndrome. Dr. Allen calculated that appellant had a net adjustment of zero, resulting in no movement from the default value of C and corresponding to a one percent left upper extremity impairment.

In an April 4, 2020 report, the DMA, Dr. Slutsky, found that Dr. Allen's impairment evaluation was in error as he assigned a GMPE of 2 and disagreed with the physical examination findings of Drs. Brecher and Kung. The DMA explained that Dr. Allen failed to palpate appellant's wrist or perform an adequate wrist examination which would document specific sites of palpatory tenderness. He noted that Dr. Allen did not perform a Finkelstein's test, a Watson's test, or a lunotriquetral ballottement test. The DMA properly concluded that Dr. Allen's impairment rating was not supportable under the A.M.A., *Guides* as physical examination findings should be excluded from the grading process if they were determined to be unreliable or inconsistent under section 15.3b, page 407.[20] The Board finds that the DMA properly explained that Dr. Allen's addendum was insufficient to establish permanent impairment of a scheduled member or function of the body.[21]

Appellant has submitted no other medical evidence in conformance with the A.M.A., *Guides* establishing permanent impairment of a scheduled member or function of the body. The Board therefore finds that she has not met her burden of proof to establish her schedule award claim.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

[19] *See V.G.*, Docket No. 19-1728 (issued September 2, 2020).

[20] *See* A.M.A., *Guides* 407; *J.H., supra* note 9.

[21] *See N.T.*, Docket No. 20-0667 (issued November 25, 2020).

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 27, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board